

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

RONALD RICH,
PLAINTIFF,
v.

STEPHEN MARANVILLE,
SUPERINTENDENT,
DEFENDANT.

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No. 2:02-CV-310

MEMORANDUM AND ORDER

Ronald Rich, pursuant to 28 U.S.C. § 2241, petitioned the Court for a writ of habeas corpus on November 27, 2002, challenging the conversion of his regular parole to special parole by the United States Parole Commission, which has resulted in the loss of approximately four years of "street time" credit. On January 13, 2003, due to the government's failure to file a response and pursuant to 28 U.S.C. § 2243 and Fed. R. Civ. P. 55(e), Rich requested that the Court review his petition on the merits and grant his writ by default. On January 16, 2003, the government filed its opposition to this motion for default judgment and requested that the Court issue a show cause order and, pursuant to 28 U.S.C. § 2243, asked for 20 days to respond.

On January 29, 2003, the Court issued an order serving Rich's petition upon the government and requiring an answer within 20 days of that service. The government accepted service February 4, 2003 and February 21, 2003 filed a response to Rich's petition. On March 7, 2003, Rich filed a motion

requesting that the Court reconsider and vacate its show cause order, that it strike the government's response to Rich's petition, and that it grant Rich's motion for default judgment and his habeas petition. Also on March 7, 2003, Rich replied to the government's response and moved to strike Exhibits 1-9 and 24.

For the reasons set forth below, Rich's petition for writ of habeas corpus is denied. To the extent Rich's motion for reconsideration and his related motions to strike the government's response and for default judgment are properly before this Court, these motions are also denied. Moreover, because the Court did not rely on exhibits 1-9 and 24, and in any event was not influenced by them, it denies Rich's motion to strike these exhibits as moot.

Background

In December 1985, Rich received two concurrent ten year sentences of imprisonment, with an eight year special parole term to follow.¹ In May 1991, he was released from prison and placed on regular parole. His special parole term commenced in

¹Special parole differs from regular parole in that it is imposed by the district court judge and it is to be served at the end of and in addition to a prison term. See Evans v. U.S. Parole Comm'n, 78 F.3d 262, 263 (7th Cir. 1996). Also, special parolees who violate parole return to prison to serve their entire special parole terms and receive no credit for "street time" whereas regular parolees receive credit for violation-free "street time." Id.

May 1995. In February 1996, pursuant to a violation, the Parole Commission revoked Rich's special parole, ordered that he receive no credit for "street time," and imposed a sixteen month jail term. In December 1996, based upon Fowler v. United States Parole Commission, 94 F.3d 835 (3d Cir. 1996), which held that revocation of special parole meant that it was terminated, the Commission converted Rich's unexpired special parole term to regular parole.²

In 2000, while on regular parole, Rich violated and his parole was again revoked. At that point, because he was on regular parole, he had accumulated approximately four years of "street time" credit. In February 2001, based on Johnson v. United States, 529 U.S. 694 (2000), which redefined "revoke" as meaning "suspend" in the context of supervised release, the Commission vacated its 1996 conversion of Rich's parole from special to regular. It informed Rich in a Notice of Action that

²Until Fowler, pursuant to federal regulations, the Commission required that special parolees who have had their parole revoked resume their unexpired special parole term upon release. 28 C.F.R. § 2.57(c) (providing that if a parolee violates during special parole he will be subject to revocation and reparole under the same special parole term). But in 1996 and thereafter, a number of circuit courts held that once revoked, special parole was nullified (rather than suspended). See Fowler, 94 F.3d 835; see also Strong v. U.S. Parole Comm'n, 141 F.3d 429 (2d Cir. 1998). As a consequence, the Commission, upon revocation of special parole within these circuits, converted special parole terms imposed within these circuits to regular parole in instances where special parole had been revoked.

his original special parole term, which started in 1995, was reinstated. The Commission then ordered that Rich serve a nine month jail term.

Rich was released on June 24, 2001 and placed on special parole until August 27, 2007. In a June 27, 2001 Notice of Action, Rich was informed that he would not receive street time credit for the four years he spent out of jail during the term that was converted from special to regular and then back to special parole. Although he has not received this street time credit, Rich's special parole term has been reduced to account for the time he spent in custody since November 20, 1994.

On September 24, 2002, after another violation, Rich's special parole was once again revoked. He is currently incarcerated, having yet to complete his eight year special parole term.

Discussion

Rich challenges the Parole Commission's authority to reimpose special parole. He asserts that the Supreme Court's decision in Johnson v. United States has no bearing on the Parole Commission's decision to convert his original special parole term to regular parole because the decision involved supervised release and not parole. The government argues that Johnson applies in this context because supervised release is an outgrowth of special parole and the statutes authorizing both

programs are virtually identical and serve identical purposes.

_____Before it was repealed, 21 U.S.C. § 841(c) (1982) (repealed 1984), the statute authorizing revocation of special parole read,

A special parole term imposed under this section . . . may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

In Strong v. United States Parole Commission, 141 F.3d 429 (2d Cir. 1998), the Second Circuit held that the Parole Commission lacked authority to re-parole a parolee to special parole after his original special parole term was revoked.³ In doing so, it analyzed and defined the word "revoke" by relying on how it had previously defined revoke in the context of supervised release under § 3583(e):⁴

³The original conversion of Rich's parole was based on the same logic used by the Strong court -- namely that revocation of a special parole term meant annulment of that term.

⁴ 18 U.S.C. § 3583(e), provides that a court may:

- (1) terminate a term of supervised release and discharge the defendant released . . . ;
- (2) extend a term of supervised release . . . [and] modify, reduce, or enlarge the conditions of supervised release . . . ;

In construing the nearly identical statute governing supervised release, 18 U.S.C. § 3583(e)(3), this Court held that the term "revoke" had the plain meaning of "'to cancel or rescind.'" Therefore, we found that a district court had no authority to reimpose a term of supervised release once the original term had been revoked. . . .

Although § 3583(e)(3) was enacted seventeen years after § 841(c), we find compelling reasons to interpret the two sections together. Indeed, almost every circuit court to address this issue has relied on a prior interpretation of § 3583(e)(3) in analyzing § 841(c). Under the Sentencing Reform Act of 1984, supervised release replaced special parole, and is similar in many ways except that supervised release is administered by the judicial branch and not the Parole Commission. Congress instituted the change by "substituting the words 'supervised release' for 'special parole' throughout the United States Code and adding new provisions governing the termination of supervised release by district courts." Evans v. United States Parole Comm'n, 78 F.3d 262, 264 (7th Cir. 1996). The language of § 3583(e)(3) is substantially similar to § 841(c) in that Congress provides for "revocation" of a statutorily-created sentence without granting any explicit authority to reimpose that sentence. As the Sixth Circuit has noted, "While it is certainly undeniable that there are small variations in the way the two programs are handled, and in the entities which handle them, these are mere 'distinction[s] without a difference.'" "

Id., 141 F.3d at 432-433 (citations omitted).

In Johnson v. United States, the Supreme Court redefined "revoke" as meaning "suspend" in the context of supervised release. In so holding, the Johnson Court actually reviewed and

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release . . . ; or
(4) order the defendant to remain at his place of residence. . . .

relied upon the Commission's treatment of the word "revoke" in the context of parole and special parole, stating that

there never seems to have been a question that a new term of parole could follow a prison sentence imposed after revocation of an initial parole term Thus, 'revocation' of parole followed by further imprisonment was not a mere termination of limited liberty that a defendant could experience only once per conviction

Id. at 711-12. More specifically, the Court noted that

[t]he same holds true for special parole, part of the required sentence for certain drug offenses. Though the special parole statute did not explicitly authorize reimposition of special parole after revocation of the initial term and reimprisonment, the Parole Commission required it.

Id. at 712 n.11 (citing 28 C.F.R. § 2.57(c) (1999)). On this basis it reasoned that "it is fair to suppose that in the absence of any textual bar, 'revocation' of parole's replacement, supervised release, was meant to leave open the possibility of further supervised release, as well." Id. at 712.

In light of its own reliance upon the substantial similarities of these statutes in defining the term "revoke," the Second Circuit would now likely conclude that Johnson controls how the Commission must construe the revocation of special parole. Indeed, in reimposing Rich's special parole, the Commission is merely following this logic, i.e., using the guidance of the Court's construction of § 841(c), which comports with the Commission's original practice of reimposing special

parole.

The Johnson Court's reliance on the textual language of § 3583(e) and its contrasting of subsection (e)(1) with subsection (e)(3) reinforces this reasoning. Because subsection (e)(1) uses the "unequivocal" phrase "terminate a term of supervised release," the Court reasoned that in devising subsection (e)(3), Congress would naturally have tracked that language had it meant to foreclose the reimposition of supervised release pursuant to a violation. Johnson, 529 U.S. at 704. The same logic applies when comparing these subsections to § 841(c)(1982) (repealed 1984). If in drafting these subsections as an outgrowth of § 841(c), see Strong, 141 F.3d at 432-433, Congress had meant for revoke to mean termination in the context of supervised release it would not have deviated from the original language of §841(c). That is to say, in drafting § 3583(e)(1) it never would have used the word terminate to begin with.

Moreover, in its analysis of 3583(e)(3), the Johnson Court focused on the fact that the revoking court could not "revoke the release term and require service of a prison term equal to the maximum authorized length of a term of supervised release. [Section 3583(e)(3)] provided, rather, that the court could 'revoke' a term of supervised release, and require the person to serve in prison all or part of the term of supervised release. . . ." The Court reasoned that so far as this text is concerned,

"it is not a 'term of imprisonment' that is to be served, but all or part of 'the term of supervised release.' But if 'the term of supervised release' is being served, in whole or in part in prison, then something about the term of supervised release survives the preceding order of revocation."

Using similar reasoning, the D.C. Circuit has held that the new term of imprisonment under § 841(c) for special parole violations is set by statute and "the only open issue is whether the parolee must serve all of that term behind bars, or may serve the term through a combination of incarceration and special parole." See U.S. Parole Comm'n v. Williams, 54 F.3d 820, 824-825 (D.C. Cir. 1995). Section 841(c) provides that,

A special parole term imposed under this section . . . may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve **all or part** of the remainder of the new term of imprisonment.

18 U.S.C. 841(c) (1982) (repealed 1984) (emphasis added).

Although this language establishes a "new term of imprisonment," the fact that it allows for the violator to serve "all or part" of the remainder of this new term supports the view espoused in Williams. Section 841(c) mandates a new prison term equal to the term of special parole. Nowhere does it suggest that only regular parole may be imposed following a revocation of special

parole leading to revocation. The Williams court noted that it is therefore reasonable to assume that although § 841(c) requires the Commission to impose the special parole term as a term of imprisonment, the "new term of imprisonment" should consist of a period of confinement followed by special parole equal to the original special parole term less the time served in prison. Williams, 54 F.3d at 824-825.

Finally, the Johnson Court also relies on the fact that the congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from the prison to liberty. Johnson, 529 U.S. at 709-710. It states that Congress intended supervised release to assist individuals in their transition to community life and supervised release fulfills rehabilitative ends distinct from incarceration. Id. It states further that "no prisoner needs [supervised release] more than one who has already tried liberty and failed. He is the problem case among problem cases" The same purpose holds true for special parole and for offenders like Rich. As the Second Circuit explained in Mastrangelo v. United States Parole Commission:

The mandatory special parole term is designed to test the offender's ability to lead a lawful life in the community. Special parole "is not part of an original sentence of imprisonment and it is in addition to, and not in lieu of, any other parole available to the prisoner." If the conditions of special parole are violated, the parolee is returned to prison to serve the entire special term, not merely that portion which

remained at the time of the violation. This provides an additional incentive for the parolee to lead a lawful life in the community for an extended period of time, hopefully creating habits conducive to continuing lawful ways after expiration of the term.

Mastrangelo v. U.S. Parole Comm'n, 682 F.2d 402, 404-05 (2d Cir. 1982). Based on the similar purpose of the two regimes and for the reasons stated above, the Court finds that the Parole Commission properly vacated its decision, and reimposed special parole in the instant case.

Rich claims that even if the Commission had authority to reimpose special parole, to reimpose it retroactively against him would violate the Ex Post Facto clause. The Commission, however, is well within its authority to remedy a mistake. Indeed, it is well-settled that the Commission can retroactively forfeit street time granted through an erroneous interpretation or application of the law. See McQuerry v. U.S. Parole Comm'n, 961 F.2d 842 (9th Cir. 1992); Cortinas v. U.S. Parole Comm'n, 938 F.2d 43 (5th Cir. 1991). Judge Coffrin sentenced Rich to two ten year concurrent prison terms and an eight year special parole term. Rich served the prison terms through a combination of incarceration and regular parole and then began his term of special parole. The Parole Commission revoked Rich's special parole term and in view of the rulings in Fowler and Strong converted it to regular parole. Fowler and Strong have now been overruled by implication. No Ex Post Facto defect arises when

the Parole Commission simply corrects a practice contrary to a preexisting statutory provision. Caballery v. U.S. Parole Comm'n, 673 F.2d 43, 47 (2d Cir. 1982). If the Parole Commission had no authority to convert Rich's original special parole term in the first place, it is not now overstepping its statutory power, but merely restoring the original will of the district court.

Conclusion

WHEREFORE, for the reasons stated above, Rich's petition for a writ of habeas corpus is **DENIED**. Dated at Burlington, Vermont this ____ day of July, 2003.

William K. Sessions, III
Chief Judge